IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 706

CITY OF CHICAGO, a Municipal Corporation, BOARD OF HEALTH OF THE CITY OF CHICAGO, DR. ROBERT A. BLACK, Health Commissioner and Acting President of Board of Health of the City of Chicago,
Petitioners,

vs.

FIELDCREST DAIRIES, INC.,
Respondent.

PETITIONERS' REPLY TO BRIEF OF AMICUS CURIAE, THE STATE OF ILLINOIS.

BARNET HODES,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago, Illinois.
Attorney for Petitioners.

JAMES A. VELDE,
Assistant Corporation Counsel,
WALTER V. SCHAEFER,
Of Counsel.

CHAMPLIN-SHEALY COMPANY, CHICAGO 365

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The brief of the Illinois attorney general as *amicus curiae* has been filed at the last possible moment. Had the business of the court permitted, this case would have been argued and submitted two weeks before the brief of the attorney general was filed. The Milk Pasteurization Plant Law became effective in July of 1939. From that time on the attorney general could have questioned by *quo warranto* in the state courts the power asserted by the city. Or the attorney general might have appeared in either of the lower courts at any time during the pendency of this

case and asserted his present position. Instead, his appearance is made at the last possible moment before the case is to be submitted upon oral argument.

The attorney general's apparent belief that duty required him to appear is based upon a fundamental misconception of the 1939 Milk Pasteurization Plant Act. His brief says (p. 2) that he appears, for one reason, because the case involves "an important public question that affects the public interests of the People of the State of Illinois." The only interest of the people of the state in this litigation lies in having the court hold that Illinois municipalities have the powers granted to them by the state legislature, whatever those powers may be. It is not to the interest of the people of the state to have the court hold that Illinois municipalities have been deprived by the legislature of powers that the legislature preserved in them in the 1939 statute. The attorney general also appears, he says (p. 2), to request the court to "abstain from any action in this cause which may impinge the authority of the State by limiting the general application throughout the State of an Act of the General Assembly." A decision in favor of the petitioners will not affect the authority of the state in any way or limit the general or territorial application of the 1939 statute throughout the state or limit it in any other way. When the entire statute (including the saving clause) is considered, it preserves to municipalities the very powers which the attorney general seeks to strike down. The authority of the state legislature will be affected by this litigation only if the courts fail to follow the clear language of the statute.

The petitioners' reply brief contended that there was no controversy in this case between the State of Illinois and Illinois municipalities, since the state in the 1939 Milk

Pasteurization Plant Act had expressly preserved all the former powers of municipalities to regulate the milk industry. And the petitioners' reply brief (p. 5) characterized as "spurious" the controversy between the state and the city constantly mentioned by the respondent. Now at the last moment the attorney general of the state appears in opposition to the city, seeming to make the "controversy" come to life.

The mere appearance of the attorney general does not render the alleged controversy any less spurious. The petitioners concede that the state's power is paramount. There is no question here about the power of the state to regulate milk. The controversy is about the extent of municipal power and is between the respondent and the petitioners. The question is whether or not the state has impaired a power of the city. The state's sovereignty or authority is not involved. The simple problem of statutory construction presented will be solved by interpreting the language used and considering the object sought to be achieved by the legislature. The identity of the champion of one interpretation or another has no bearing on the correct solution of the problem.

It is appropriate therefore to consider what light has been shed upon the question before this court by the appearance of the attorney general. In the first place, it is not without significance that the attorney general does not request this court to refrain entirely from passing upon the construction of the statute. To the contrary, his request is simply that the court refrain from deciding the question of statutory construction against Fieldcrest Dairies, Inc. (brief of *amicus curiae*, pp. 2, 3). A consideration for the broad principles of statesmanship which prompt this court to refrain from the decision of

local questions might be expected to move the attorney general to request the court to refrain entirely from a decision of the question. This, however, is not the position which the attorney general asserts.

We may well concede that in the absence of a saving clause the position asserted by the attorney general and by the respondent would be sound. Such a concession, however, does not advance the determination of the case. A discussion of a non-existent statutory situation is not helpful. The attorney general's lack of understanding of the problem involved is clearly shown in his discussion of the saving clause (brief of *amicus curiae*, p. 7). All that is said of the saving clause is this:

> "It is submitted there is nothing in this section that might properly be interpreted as authorizing the city to outlaw the containers that the State has legalized for use within the state, in accordance with the express provisions of the Act."

This much is said. It is the sole contribution of the attorney general toward the solution of the controversy before the court. What is unsaid is most significant. The argument of the attorney general is inadequate in the same particulars as the respondent's argument (see reply brief of petitioners, pp. 8-9). The attorney general suggests no meaning that can be ascribed to the saving clause. No inference is possible from his argument save the inference that municipal control of all matters dealt with in the Milk Pasteurization Plant Law has been completely destroyed.

The logic of his argument would compel him to assert that any subject dealt with in the statute or in the "minimum requirements" adopted pursuant to it is "legalized" and so placed beyond the reach of municipal control. The

same logic would be applicable to the saving clause contained in the Grade A Milk Law, which the *state* Department of Public Health construes as authorizing municipalities to make more stringent regulations than the state (see reply brief of petitioners, p. 13), an interpretation which the respondent itself (brief, p. 32) concedes to be correct. The position of the respondent and the attorney general is that the legislature meant one thing in the saving clause of the Milk Pasteurization Plant Law, which primarily regulates dairy plants, and another thing in using similar language in the saving clause of the Grade A Milk Law, which primarily regulates dairy farms. In other words, the attorney general attributes to the legislature the anomolous intention of continuing the power of cities to regulate dairy farms (which of course are in non-urban areas) and withdrawing the power to regulate dairy plants.

The attorney general (pp. 4-6) repeats the argument of the respondent that the state's "approval" of the equipment and methods of operation of pasteurization plants and the requirement that milk must be placed in the final delivery container in the plant mean that the state "legalizes" and "approves" single-service milk containers. This is said to be the policy of the legislature. Any approval manifested by the statute is made subject to the express provision in the statute itself that permits more stringent municipal regulation. This obvious answer to the argument that the state has "approved" paper milk containers was made in the petitioners' original brief (p. 24). It has not been answered either by the respondent or the attorney general.

After discussing the Milk Pasteurization Plant Law without mentioning the saving clause, the attorney general (brief, pp. 5-6) asks this rhetorical question:

> "How could the Legislature any more clearly evidence an intent that milk which is pasteurized in a pasteurization plant approved by the State Department of Public Health, placed in containers in said plant, which containers are aproved by the Department of Public Health, and which must be sold in said original containers, may be sold in said containers at any place in the State of Illinois?"

Such a question might be pertinent if the saving clause had been omitted from the statute. A more pertinent inquiry is this: How could the legislature any more clearly evidence an intent that the police power in this field of public health protection is to be distributed between the state and its municipalities in such a manner that the minimum requirements of the state may be increased by municipalities?

The attorney general's brief (pp. 7-8) quotes a stipulation in the record about testimony which would be given by one S. V. Layson if called as a witness. The testimony relates to certificates of approval issued by the state Department of Public Health to Fieldcrest Dairies, Inc. on November 17, 1938 for the calendar year 1938 and on January 18, 1939 for the calendar year 1939. At the time of the issuance of these certificates the 1939 Milk Pasteurization Plant Law had not been enacted. Their issuance does not show that the 1939 statute impaired the city's power. And in any event the state's certificate of approval is merely evidence of compliance with state regulations; the saving clause says that municipalities may impose other and more strict regulations.

The brief of the *amicus curiae* (p. 9) contributes nothing in its attempt to show that the cases of *City of Geneseo* v. *Illinois Northern Utilities Co.*, 378 Ill. 506 (1941), and *City of Ottawa* v. *Brown*, 372 Ill. 68 (1939), have no ap-

plication here. The cases show clearly that in related situations the Illinois Supreme Court has interpretated legislative grants of municipal power as the petitioners contend the 1939 statute should be interpreted here.

The argument of the attorney general does not indicate a conflict between state and municipality. Unless his mere appearance urging that this court decide the question in favor of the respondent or not at all is effective to create a controversy, the status of the case is not affected by his appearance.

Respectfully submitted,

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BOARD OF HEALTH OF THE CITY OF CHICAGO,

DR. ROBERT A. BLACK, Health Commissioner and Acting President of Board of Health of the City of Chicago,

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Corporation Counsel of the City of Chicago,

511 City Hall, Chicago, Illinois,
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